

STATE OF MAINE  
KENNEBEC COUNTY, ss

SUPERIOR COURT  
CIVIL ACTION  
DOCKET NO. CV-89-88

PAUL BATES, et al.,

Plaintiffs

v.

LYNN DUBY, et al.,

Defendants

ORDER AFTER TRIAL  
ON DEFENDANTS'  
NOTICE OF  
SUBSTANTIAL  
COMPLIANCE

PART II

In the Part I Order, the court found that the defendants were not in substantial compliance with the Consent Decree as of January 25, 2002. The court now finds that the defendants did not have a good faith basis for filing a notice of substantial compliance in light of the significant deficiencies existing at that time. The court finds further, based on clear and convincing evidence, that the defendants were in contempt of the Consent Decree as of 1/25/02. The defendants had the ability to comply with the Consent Decree and did not do so. *See Pratt v. Spaulding*, 2003 ME 56, ¶ 11, 822 A.2d 1183, 1187; *Lashawn v. Kelly*, 887 F. Supp. 297, 313-14 (D.D.C. 1995). In many instances, the defendants wilfully ignored the Consent Decree or unilaterally amended its provisions without involving the court, Master, or plaintiffs.

It must be emphasized that through the Consent Decree, the parties themselves sought the court's supervision to remedy the serious problems that led to the 1989 lawsuit and the 1990 Consent Decree. Paragraph I(F)(12) of the Settlement Agreement provides:

Until the Agreement's termination pursuant to the terms of the Consent Decree, the parties hereby consent to the court's continuing supervision of

this matter, until further order of the Court, and to its authority to interpret the provisions of this Agreement, to review and adopt plans necessary to implementation of its terms, to modify its terms as may be needed to effect its purposes, and to take appropriate actions within its equitable powers to ensure its enforcement and the fulfillment of its terms and purposes.

Settlement Agreement, ¶ I(F)(12); *see also id.* ¶ XIX (“The parties agree that the terms of this Agreement may be specifically enforced directly by the Court . . . .”). The court accepted that responsibility. Thirteen years later, the court remains obligated to take appropriate action to enforce the Consent Decree.

Based on the history of this case since 1990 and the evidence presented at trial, it is clear that the defendants, if left on their own, will not achieve substantial compliance in the near future. *See Feliciano v. Gonzalez*, 13 F. Supp. 2d 151, 154 (D.P.R. 1998) (court-appointed expert concluded that there was virtually no likelihood that defendants, left to their own devices, would ever achieve compliance with the court’s order). Further, the current status of the Department of Behavioral and Developmental Services (BDS) and the Department of Human Services (DHS) is in flux. Both Commissioners have resigned and the Departments are functioning under temporary appointees. There are plans to merge these departments. Throughout all of this change, however, the Consent Decree remains in effect and the needs of class members continue.

Crucial to the court’s determination of an appropriate remedy was the defendants’ decision to file the notice of substantial compliance. Either the defendants were unaware of the serious deficiencies in the system as of 1/25/02 or they were aware of the deficiencies and filed the notice in spite of their knowledge. Neither scenario bodes well for future compliance.

The court is mindful that “the substitution of a court’s authority for that of elected and appointed officials is an extraordinary step warranted only by the most

compelling circumstances.” *Morgan v. McDonough*, 540 F.2d 527, 535 (1st Cir. 1976). Such circumstances are present in this case. After twelve years and extraordinary expenditures of state funds, the defendants have failed to comply with the important provisions of the Consent Decree. For thirteen years, the court has given due deference to the defendants’ efforts to comply with their obligations. See *Shaw v. Allen*, 771 F. Supp. 760, 763 (S.D. W.Va. 1990). This deference has gone unrewarded.

The findings and conclusions in the Part I Order, which are incorporated into this Part II Order by reference, provide a factual basis for appointment of a receiver. To the extent that receivership is a “remedy of last resort,” the court does not hesitate to impose it here. See *Dixon v. Barry*, 967 F. Supp. 535, 554 (D.D.C. 1997). The history of this case, the evidence presented during the seven-week trial, the defendants’ lack of accountability, and their failure to recognize reality compel the conclusion that they may never achieve substantial compliance on their own initiative. See *Newman v. Alabama*, 466 F. Supp. 628, 630, 635 (M.D. Ala. 1979); *Morgan v. McDonough*, 540 F.2d at 529; *Dixon v. Barry*, 967 F. Supp. at 550.

In *Newman v. Alabama*, after hearings to determine the degree of compliance by the Alabama Board of Corrections with the court’s orders to bring the prison system into compliance with the Eighth and Fourteenth Amendments of the Federal Constitution, the court concluded that the “Board has failed to make a genuine effort at compliance. In area after area, the Board has made no serious attempt to determine what steps can be taken with present funds and to plan what can be accomplished with additional sums. The theme running throughout the evidence is a lack of professional leadership. The Court is compelled to conclude that there is no reasonable likelihood of effective cooperation and substantial compliance from the present Board of Corrections. . . Time does not stand still, but the Board of Corrections and the Alabama

Prison system have for six years. Their time has now run out.” *Newman*, 466 F. Supp. at 630, 635.

In *Morgan v. McDonough*, the court focused on whether the lower court properly determined that the plaintiffs’ rights under a desegregation plan were being violated, and if so, whether the temporary remedies imposed were reasonable and lawful. *Morgan*, 540 F.2d at 529. The First Circuit determined that the lower court clearly had the power to take reasonable steps to ensure compliance with its own decrees and to protect the students attending Boston’s desegregated schools. *Id.*

In *Dixon v. Barry*, the court held that in determining whether a receivership is the only remedy left for the court to impose, “the court should consider whether there were repeated failures to comply with the Court’s orders, whether continued insistence that compliance with the Court’s orders would lead only to ‘confrontation and delay,’ if there is a lack of sufficient leadership to turn the tide within a reasonable time period, whether there was bad faith, and whether resources are being wasted. Finally, and perhaps obviously, the court must consider whether a receiver can provide a quick and efficient remedy.” *Dixon*, 967 F. Supp. at 550. The *Dixon* court discussed the District of Columbia’s inability and unwillingness to meet its obligation to create an integrated, community-based mental health system for treatment of the mentally ill. The court identified several factors relied upon by other courts to support imposing a receivership. Those factors included the District’s failure to comply with the court’s orders for many years; the failure of other remedies, including use of the court’s contempt power, which resulted only in actions by the District sufficient to end the threat of contempt; the mismanagement and waste of resources; and the District’s efforts to evade the court’s orders. *Id.* at 537, 554.

## AUGUSTA MENTAL HEALTH INSTITUTE

Pursuant to paragraphs I(F)(12) and XIX of the Settlement Agreement, the following is ordered:

1. A receiver will be appointed to operate the Augusta Mental Health Institute (AMHI) until substantial compliance with the Consent Decree is achieved. After conferring with the parties, the Master will submit the nomination of a receiver to the court within 30 days of the date of this Part II Order. If the court approves, the receiver will be appointed. Agreement of the parties to the Master's nomination is not required.

2. The powers and authority of the receiver shall be those that in usual circumstances are vested in the Superintendent of AMHI as they relate to the Superintendent's duties and obligations under the Consent Decree. The receiver will have the responsibility and authority to comply with all provisions of the Consent Decree and Settlement Agreement.

3. The receiver's powers, authority, and duties include but are not limited to the following:

- A. To oversee, supervise, and direct all financial, contractual, legal, administrative, and personnel functions at AMHI that relate to the Consent Decree and to restructure AMHI into an organization that will achieve compliance;
- B. To contract with public and private agencies, to appoint personnel, and to do whatever is lawful and required for the administration of AMHI;
- C. To formulate and implement plans necessary to provide acceptable levels of staff, service, and safety for patients at AMHI in compliance with the Consent Decree;

- D. To have unlimited access to records and files maintained by AMHI as reasonably necessary to achieve compliance with the Consent Decree;
- E. To have unlimited access to all facilities, buildings, and premises under the control of AMHI as reasonably necessary to achieve compliance with the Consent Decree;
- F. To retain consultants, experts, or other persons to provide training to the AMHI staff or to assist in any other manner necessary to carry out the duties as receiver and to achieve compliance with the Consent Decree;
- G. To conduct confidential interviews with all AMHI employees and staff; such persons shall cooperate with the receiver and respond to all inquiries and requests related to compliance with the Consent Decree;
- H. To conduct confidential interviews with patients at AMHI;
- I. To establish personnel policies; to create, abolish, or transfer positions; to hire, terminate, promote, transfer, and evaluate staff; and to set staff compensation;
- J. To negotiate new contracts and renegotiate existing contracts, including contracts with labor unions;
- K. To restructure the management and administrative organization of AMHI as necessary or appropriate to achieve compliance with the Consent Decree;
- L. To acquire, dispose of, modernize, repair, and lease property;
- M. To establish the budget of AMHI as necessary to comply with the Consent Decree and to work with the Legislature in securing approval for the budget;

- N. To recommend to the court any appropriate modifications of the Consent Decree;
- O. To petition the court for any additional powers and orders that are necessary to perform the duties as receiver;
- P. To cooperate with the court, Master, and attorneys for the parties and report to the court on a monthly basis;
- Q. To prepare a work plan for submission to the court, Master, and attorneys for the parties within two months of the date of appointment. The plan will (1) review and document accurately the current conditions at AMHI as they relate to the Consent Decree, (2) describe specific objectives and tasks that will be undertaken to address each concern relating to AMHI outlined in the Part I Order and to achieve compliance, and (3) outline specifically the time frame, not to exceed nine months from the date of appointment, within which those tasks will be accomplished.

4. The defendants are responsible for all reasonable costs of the receivership. The receiver shall be indemnified in the same manner and to the same extent as other agency heads within State government. Within fifteen days of the receiver's appointment, the Master shall submit for the court's approval a proposal for compensation of the receiver's services and expenses.

5. The defendants, their successors in office, agents, employees and servants, and all persons in concert and participation with them, are ordered to observe faithfully the obligations of this Order and to cooperate fully with the receiver in the discharge of the receiver's duties.

6. The receivership shall last no longer than necessary to correct the conditions that justify it. The receivership shall last for a period of one year unless, prior to such

time, the receiver certifies to this court that he has accomplished the tasks and has determined that AMHI has achieved compliance with the Consent Decree and will continue to comply without the receiver's supervision. If, after one year, the receiver determines that a continuation of the receivership is necessary either to achieve compliance or to certify that AMHI will remain in compliance without supervision, the receivership may be extended.

#### THE COMMUNITY-BASED SYSTEM

Pursuant to paragraphs I(F)(12) and XIX of the Settlement Agreement, the following is ordered:

1. A receiver will be appointed for the purpose of operating the community-based mental health system for the State of Maine to achieve compliance with the Consent Decree.

2. The powers and authority of the receiver shall be the powers and authority that in usual circumstances are vested in the Commissioners of the BDS and DHS as those powers and authority relate to the Commissioners' duties and obligations pursuant to the Consent Decree. The receiver will have the responsibility and authority to comply with all provisions of the Consent Decree and Settlement Agreement. A description of the powers, authority, and duties of the receiver will be the subject of a separate order.

3. Appointment of this receiver will be stayed for six months from the date of this Part II Order to give the defendants an opportunity to purge their contempt by making substantial progress, as determined by the court, Master, and parties, toward compliance with the Consent Decree. The defendants will, among other things, accomplish the following within that time frame:



- A. Develop within the State of Maine an integrated and comprehensive community-based mental health system in compliance with the provisions of the Consent Decree;
- B. Develop and improve management systems, performance standards, and quality improvement and quality assurance measures as they relate to the Consent Decree;
- C. Improve relations among the BDS, DHS, and their employees, contractors, and clients;
- D. Establish a work plan for submission to the court, Master, and plaintiffs' attorneys within two months from the date of this Part II Order. The plan will (1) review and document accurately the current status of the mental health system as it relates to the Consent Decree, (2) describe specific objectives and tasks the defendants will undertake to address each concern outlined in the Part I Order and to achieve compliance, and (3) outline specifically the time frame, not to exceed nine months from the date of this Part II Order, within which those tasks will be accomplished;
- E. Cooperate with the court, Master, and attorneys and report to the court on a monthly basis.

#### ATTORNEY FEES

The defendants will pay plaintiffs' reasonable attorney fees, costs, and expenses, including expenditures for expert witnesses in preparation for and attendance at trial. *See* Consent Decree, ¶ 21; Settlement Agreement, ¶ 273. Plaintiffs will submit their affidavit of attorney fees and costs to the defendants for review within 20 days of the date of this Order. Plaintiffs will file with the court their final affidavit of attorney fees and costs within 30 days of the date of this order.

The clerk is directed to incorporate this Part II Order into the docket by reference.

Date: September 10, 2003

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Nancy Mills  
Chief Justice, Superior Court